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***Case No COMP/M.4994 -  
ELECTRABEL /  
COMPAGNIE  
NATIONALE DU  
RHONE***

Only the French text is authentic.

**REGULATION (EC) No 4064/89  
MERGER PROCEDURE**

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Article 14(2)  
Date: 10/06/2009



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10 June 2009

C(2009) 4416

PUBLIC VERSION

**Commission Decision**  
**of 10 June 2009**  
**imposing a fine for putting into effect a concentration in breach of Article 7(1) of**  
**Council Regulation (EEC) No 4064/89**  
(Case COMP/M.4994 *Electrabel/Compagnie Nationale du Rhône*)  
(Only the French text is authentic)  
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, and in particular Article 26(2) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings<sup>2</sup>, and in particular Article 14(2)(b) thereof,

Having given Electrabel SA the opportunity to put forward its observations on the concerns raised by the Commission,

Having consulted the Advisory Committee on Concentrations<sup>3</sup>,

Having regard to the final report by the Hearing Officer in this case<sup>4</sup>,

WHEREAS:

I. INTRODUCTION

1. On 26 March 2008 the Commission received notification in accordance with Article 4 of Regulation (EC) No 139/2004 of a planned merger whereby Electrabel SA ("Electrabel", Belgium), controlled by the Suez group ("Suez", France), was to acquire, within the meaning of Article 3(1)(b) of that Regulation, control over Compagnie National du Rhône SA ("CNR", France) by purchase of shares.
2. On 9 August 2007 Electrabel had contacted the Commission in order to obtain its opinion on the acquisition by Electrabel of *de facto* sole control over CNR. There followed a series of discussions between Electrabel's legal advisers and the Commission, the purpose being to enable the latter to analyse the present and past situation of CNR in this regard.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1.

<sup>2</sup> OJ L 395, 30.12.1989, p. 1; corrected version: OJ L 257, 21.9.1990, p. 13. Regulation last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

<sup>3</sup> OJ C 279, p.6

<sup>4</sup> OJ C 279, p.7

3. After the discussions, the Commission came to the conclusion that Electrabel had indeed acquired *de facto* sole control over CNR. As the thresholds laid down in Article 1 of Regulation (EC) No 139/2004 were exceeded, Electrabel notified this transaction on 26 March 2008.
4. On 29 April 2008, acting under Article 6(1)(b) of Regulation (EC) No 139/2004, the Commission decided not to oppose the concentration, and declared it compatible with the common market and the EEA Agreement.
5. In its decision the Commission concluded that Electrabel did indeed exercise *de facto* sole control over CNR but left open the question as to the exact date on which control was acquired, as this had no implications for the competition analysis of the transaction.
6. The information in the Commission's possession shows that Electrabel had in reality acquired exclusive control of CNR on 23 December 2003, before the entry into force of Regulation (EC) No 139/2004.
7. Article 26(2) of Regulation (EC) No 139/2004 states that any concentration in which control was acquired prior to the date of application of that Regulation continues to be governed by Regulation (EEC) No 4064/89.
8. On 17 December 2008, the Commission sent Electrabel a statement of objections on the basis of Article 18 of Regulation (EEC) No 4064/89. In the statement of objections the Commission explained why it believed that Electrabel had in fact already gained sole control of CNR as of 23 December 2003, i.e. prior to the entry into force of Regulation (EC) No 139/2004.
9. On 16 February 2009, Electrabel replied to the statement of objections, requesting a hearing, which was held on 11 March 2009. On 23 March 2009, the Commission sent a letter setting out the facts of the case to Electrabel, in order to elicit its views on a number of issues raised in connection with CNR in the Suez group annual report for 2003 and the Electrabel annual report for 2004. Electrabel replied to this letter on 30 March 2009.

## **II. THE PARTIES**

10. Electrabel is a subsidiary of Suez. The Suez group is an industrial and service group active in the management of public utility services as a partner of local authorities, undertakings and individuals in the electricity, gas energy services, water and public health sectors. The Commission authorised the merger between Gaz de France (GDF) and Suez by decision of 14 November 2006, subject to commitments entered into by the parties. Although it was delayed in relation to the initial timetable, the merger took effect on 22 July 2008.
11. Electrabel is engaged more specifically in four basic activities: (i) production of electricity; (ii) sale of electricity, natural gas and energy products and services; (iii) trading in electricity and natural gas; and (iv) operational management of electricity and natural gas distribution networks on behalf of certain distribution network operators. It carries out its activities in France notably through its subsidiary Electrabel France.
12. CNR has the task of developing and managing the Rhône valley under a concession granted by the French State with a specific legal framework (Law of 11 December 2001, the "Murcef Law" – see paragraph 17). In this capacity, it is a

producer and supplier of electricity and a competitor of EDF. CNR also provides river engineering services in France and in twenty or so other countries.

### **III. THE INFRINGEMENT**

#### **A. COMMUNITY DIMENSION**

13. If one takes the view, as this Decision does, that Electrabel took control of CNR on 23 December 2003, the turnover to be taken into account in order to establish whether the transaction has a Community dimension is that realised over the last financial year for which the accounts had been audited, that is, 2002. In 2002 Suez had a turnover of €46 089 million worldwide, including €36 528 million in the Community. In the same year 2002 CNR had a turnover of €401 million worldwide, including €398 million in the Community. Neither undertaking achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Accordingly, the concentration is above the thresholds laid down in Article 1(2) of Regulation (EEC) No 4064/89 and Article 1(2) of Regulation (EC) No 139/2004, and has a Community dimension.
14. In its reply to the statement of objections, Electrabel submits that in the statement of objections the Commission failed to classify the infringement in legal terms, in that it did not specify the facts that might allow the conclusion to be drawn that a concentration with a Community dimension had taken place.
15. This argument is not well founded. In paragraph 3 and footnote 3 of the statement of objections the Commission states that the thresholds laid down by Regulation (EEC) No 4064/89 and Regulation (EC) No 139/2004 have been reached, and gives the turnover figures for Suez and CNR in 2002.
16. Moreover, the Electrabel representative was asked about this point at the hearing, and did not then argue that Electrabel had been unable to exercise its right of defence on the point. He merely indicated that Electrabel considered the statement of objections unsatisfactory, and reserved all Electrabel's rights.

#### **B. SHAREHOLDING STRUCTURE AND MANAGEMENT OF CNR**

##### **1) Changes in the shareholding structure of CNR**

17. Article 21 of Law No 2001-1168 of 11 December 2001 (the "Murcef Law") prohibits a private operator from holding more than 50% of CNR's capital or voting rights<sup>5</sup>. Articles 6 and 39 of CNR's articles of association also contain this prohibition.

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<sup>5</sup> The Murcef Law (establishing urgent measures for economic and financial reforms) stipulates in Article 21 that a majority of CNR's capital and voting rights must be held by local or regional authorities, by other legal persons governed by public law or by undertakings belonging to the public sector. The public entities that currently hold a majority of CNR's capital and voting rights are Caisse des Dépôts et Consignations (CDC) and close on 200 local or regional authorities and other local public entities (such as chambers of commerce and industry, chambers of agriculture and port authorities).

18. The Murcef Law remains in force on the date of this Decision, and was therefore in force on 23 December 2003, when Electrabel did not notify the acquisition of control over CNR, and on 26 March 2008, when it did notify the acquisition.
19. The Murcef Law prohibits private operators from acquiring the *de jure* control over CNR which would be conferred by an absolute majority of voting rights.
20. It should, however, be pointed out that holding more than 50% of the capital or voting rights is in no way indispensable when it comes to exercising control over a company within the meaning of Community merger control legislation (whether Regulation (EEC) No 4064/89 or Regulation (EC) No 139/2004).
21. A much smaller share of the capital may confer control<sup>6</sup>. This principle is recalled by the Commission notice of 2 March 1998 on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings<sup>7</sup> and the Commission consolidated jurisdictional notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, adopted on 10 July 2007<sup>8</sup>.
22. Table 1 below summarises the changes in the share (of voting rights and capital) held by shareholders with more than 2% of the voting rights in the period 2003-2007.

**TABLE 1: CHANGES IN THE PARTICIPATION OF SHAREHOLDERS WITH MORE THAN 2% OF THE CAPITAL OF CNR AND THEIR SHARE OF VOTING RIGHTS AT GENERAL MEETINGS SINCE 2001**

Shareholder	Share held in CNR	2001	2002	2003	2004	2005	2006	2007
Electrabel	in terms of capital	--	--	17.86 %	49.95 %	49.94 %	49.98 %	49.98 %
	in terms of voting rights	--	--	16.88 %	47.92 %	47.92 %	47.97 %	47.97 %
Caisse des Dépôts et Consignations	in terms of capital	13.2 %	13.69 %	7.21 %	29.43 %	29.43 %	33.20 %	33.20 %
	in terms of voting rights	13.2 %	13.69 %	9.80 %	29.80 %	29.80 %	33.19 %	33.19 %
SNCF	in terms of capital	16.66 %	16.66 %	22.22 %	--	--	--	--
	in terms of voting rights	16.66 %	16.66 %	20 %	--	--	--	--
CIC Finances (trustee of	in terms of capital	16.38 %	16.38 %	22.22 %	--	--	--	--

<sup>6</sup> See for example Commission Decision of 3 August 1993 in case IV/M.343 - *Société Générale de Belgique/Générale de Banque*.

<sup>7</sup> OJ C 66, 2.3.1998, p. 5, paragraph 14.

<sup>8</sup> OJ C 95, 16.4.2008, paragraph 59. Corrigendum in OJ 43, 21.2.2009, p. 10.

Shareholder	Share held in CNR	2001	2002	2003	2004	2005	2006	2007
EDF)	in terms of voting rights	16.38 %	16.38 %	20 %	--	--	--	--
Dpt des Hauts-de-Seine	in terms of capital	2.82 %	2.82 %	3.76 %	3.76 %	3.76 %	--	--
	in terms of voting rights	2.82 %	2.82 %	3.39 %	3.39 %	3.39 %	--	--
Dpt de Seine-Saint-Denis	in terms of capital	--	--	2.09 %	2.09 %	2.09 %	2.09 %	2.09 %
	in terms of voting rights	--	--	1.89 %	1.89 %	1.89 %	1.89 %	1.89 %
Dpt du Rhône	in terms of capital	11.10 %	11.10 %	7.74 %	--	--	--	--
	in terms of voting rights	11.10 %	11.10 %	9.09 %	--	--	--	--
Ville de Paris	in terms of capital	10.95 %	10.95 %	--	--	--	--	--
	in terms of voting rights	10.95 %	10.95 %	--	--	--	--	--
Conseil Régional Franche-Comté	in terms of capital	2.77 %	2.05 %	--	--	--	--	--
	in terms of voting rights	2.77 %	2.05 %	--	--	--	--	--
Conseil Régional Languedoc-Roussillon	in terms of capital	2.77 %	2.77 %	--	--	--	--	--
	in terms of voting rights	2.77 %	2.77 %	--	--	--	--	--
Conseil Régional PACA	in terms of capital	2.77 %	2.77 %	--	--	--	--	--
	in terms of voting rights	2.77 %	2.77 %	--	--	--	--	--
Conseil Régional Rhône-Alpes	in terms of capital	2.77 %	2.77 %	--	--	--	--	--
	in terms of voting rights	2.77 %	2.77 %	--	--	--	--	--
Dpt des Bouches-du-Rhône	in terms of capital	4 %	4 %	5.38 %	5.38 %	5.38 %	5.38 %	5.38 %
	in terms of voting rights	4 %	4 %	4.85 %	4.85 %	4.85 %	4.85 %	4.85 %

Source: Notification form, case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône. The data presented in the table are those applicable on the dates of the general meetings of CNR. They do not, therefore, correspond to the situation obtaining on 31 December of the years concerned.

23. Electrabel and Caisse des Dépôts et Consignations (“CDC”) have been CNR's two main shareholders since 2003.
24. On 24 June 2003, Electrabel acquired 17.86% of CNR's capital, corresponding to 16.88% of its voting rights<sup>9</sup>.
25. In addition, CDC, which was already a CNR shareholder, acquired SNCF's shareholding (22.22% of the capital and 20% of the voting rights) on 29 August 2003, when it became CNR's main shareholder (with 29.43% of the capital and 29.80% of the voting rights) alongside Electrabel.
26. On 23 December 2003, following in particular the acquisition of EDF's shareholding (22.22% of the capital and 20% of the voting rights), Electrabel became CNR's main shareholder, with 49.95% of the capital and 47.92% of the voting rights<sup>10</sup>.
27. Electrabel and CDC have since increased their shareholdings in CNR's capital slightly although, in accordance with the Murcef Law, Electrabel does not hold an absolute majority of the capital or voting rights (Electrabel: 49.98% of the capital and 47.97% of the voting rights; CDC: 33.20% of the capital and 33.19% of the voting rights).

## 2) **The management of CNR**

28. CNR has been a general-interest limited company since 8 July 2003, governed by a management board and a supervisory board<sup>11</sup>.
29. The system of management of CNR is determined, on the one hand, by the articles of association and, on the other, by a shareholders' agreement ("the Agreement") signed by Electrabel and CDC on 24 July 2003. The Agreement was signed at the time of the – planned – acquisition of SNCF's and EDF's shareholdings in CNR<sup>12</sup>.
30. On 8 July 2003 Electrabel and CDC signed a protocol of agreement ("the Protocol") that foreshadowed the main features of the Agreement.
31. The Agreement establishes [...] <sup>13</sup> [...] <sup>14</sup>.

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<sup>9</sup> The dates mentioned in this Decision for the acquisition of CNR shares match the dates on which the corresponding transactions were recorded in the register of movements in CNR securities.

<sup>10</sup> On 27 June 2003, EDF and Electrabel signed a promise to sell and to purchase shares, under which EDF was to transfer to Electrabel its entire shareholding in CNR's capital. In addition to EDF's shareholding, which it acquired on 24 December 2003, Electrabel acquired the shareholding of the Villefranche and Beaujolais chamber of commerce and industry on 23 December 2003.

<sup>11</sup> Decree No 2003-512 of 16 June 2003 set out the new articles of association of CNR, which had previously been a limited company with a board of directors. The supervisory board and the management board were set up on 8 July 2003.

<sup>12</sup> See the preamble to the Agreement (Annex 4 to the notification form), which states that Electrabel "plans to acquire from EDF an additional 22.2% shareholding in the capital of CNR" and that CDC "has acquired from SNCF, subject to the condition that the present agreement is concluded, an additional 22.2% shareholding in the capital of CNR".

\* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

32. The Agreement also provides that CDC and Electrabel will vote in concert in the general meeting of shareholders and on the supervisory board in order to appoint the shareholders' representatives on the supervisory board and the members of the management board (see paragraphs 34 and 36 below). [...] <sup>15</sup>.
33. Under Articles 20 and 21-1 to 3 of the articles of association, the supervisory board comprises 13 members appointed or elected for five years, namely nine shareholder representatives elected at the general meeting, two employee representatives and two representatives of the State. It elects its chairman and vice-chairman by simple majority of its members. In principle, it acts by simple majority of the members present or represented. In the event of a tied vote, the chairman or, in his absence, the vice-chairman has the casting vote. Some decisions require a special two-thirds majority, notably those relating to the appointment of members of the management board and the nomination of its chairman <sup>16</sup>.
34. The Agreement stipulates that CDC and Electrabel will vote in concert at general meetings when appointing the shareholders' representatives on the supervisory board. And so CDC and Electrabel "[...]" <sup>17</sup>.
35. Under Articles 15, 16 and 23 of the articles of association, the management board comprises three members appointed for a period of five years by the supervisory board acting by a special two-thirds majority. Its chairman, who is selected from among its members, is appointed by decree on a proposal from the supervisory board.
36. The Agreement states that CDC and Electrabel "[...]" <sup>18</sup>.
37. Under Articles 18-1 and 19 of the articles of association, decisions of the management board are taken by simple majority of the members present, with the chairman having the casting vote in the event of a tie. The management board may take any measures that are binding on the company, with the exception of

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<sup>13</sup> [...]\*.

<sup>14</sup> [...]\*.

<sup>15</sup> [...]\*

<sup>16</sup> A two-thirds majority is also required for the putting into effect and amendment of the concession documents, the appropriation of profits, and amendments to the articles of agreement.

<sup>17</sup> [...]\* The new supervisory board appointed by the extraordinary general meeting on 25 June 2003 comprised three representatives of Electrabel, three representatives of CDC and three representatives of the other shareholders (see Annex 15 to the notification form in case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône* and the replies by Electrabel of 25 June 2008 and 1 July 2008 to the questions put by the Commission on 11 June 2008). [...]\*.

<sup>18</sup> [...]\*, the supervisory board on 8 July 2003 appointed the three members of the first management board, including two who came direct from the Suez group (to which Electrabel belongs). The members of the management board appointed on 8 July 2003 were: Mr Michel Margnes (chairman and previously chairman of the board of directors of CNR before Electrabel acquired an interest in the latter's capital), Mr Alexandre Joly (special adviser to the general director responsible for the strategy, development and acquisitions of Suez from 2001 to 2003) and Mr Gaétan Paternostre (active within Electrabel since 1994).

those stipulated by the supervisory board as requiring its prior approval<sup>19</sup>. If the supervisory board refuses to endorse such a proposal, the management board may call an extraordinary general meeting of shareholders with a view to receiving authorisation to take the measure in question.

38. It should though be noted that the measures requiring approval by the supervisory board do not allow it to exercise control over CNR, namely the right to manage its activities and to determine its business policy<sup>20</sup>. In particular, the budget, the business plan and the appointment of senior management are decided by the management board and do not require approval by the supervisory board.
39. Under Article 36 of the articles of association, the general meeting of shareholders, which, in principle, is convened by the management board but which, in exceptional circumstances, may be convened by the supervisory board, acts by a majority of the votes held by shareholders present or represented.

### C. ELECTRABEL ACQUIRED SOLE CONTROL OVER CNR ON 23 DECEMBER 2003

40. In the light of the *de facto* and *de jure* circumstances described below the Commission considers that Electrabel acquired sole control over CNR, within the meaning of Article 3(3) of Regulation (EEC) No 4064/89, on 23 December 2003. Contrary to what Electrabel claims in its reply to the statement of objections, the statement of objections includes a lengthy demonstration that a concentration has indeed arisen, on the basis of a stable change of the control of the CNR. Reference is made, in particular, to section IV of the statement of objections.

1. **On 23 December 2003, with the acquisition of EDF's shareholding, Electrabel became CNR's main shareholder by far, and was assured of having a *de facto* majority at the general meeting of CNR shareholders**

41. Since acquiring EDF's holding on 23 December 2003, Electrabel has been CNR's main shareholder by far: it has 49.95% of CNR's capital, giving it 47.92% of the voting rights, while ownership of the remaining shares, excluding CDC's shareholding, has been very dispersed, since just under 200 local or regional authorities and other public entities hold 16.82% of the capital.
42. Paragraph 14 of the notice of 2 March 1998, which applied in December 2003, clearly states that "*A minority shareholder may also be deemed to have sole control on a de facto basis ... The determination of whether or not sole control*

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<sup>19</sup> At its meeting on 19 September 2003, the supervisory board unanimously restricted the powers of the management board regarding (i) guarantees (ceiling of €10 million per transaction), (ii) disposal of immovable property and participations (ceiling of €5 million per transaction), (iii) sureties (ceiling of €10 million per transaction), (iv) acquisition of fixed assets (ceiling of €5 million per unit), and (v) company start-ups, acquisition or extension of shareholdings (ceiling of €10 million per transaction). If these transactions exceed the thresholds indicated, they must be approved by the supervisory board. Its approval is also required for membership of any economic interest grouping (GIE) or any association or company that may entail CNR's joint and several and/or unlimited liability.

<sup>20</sup> Both within the meaning of paragraphs 21 *et seq.* of the notice of 2 March 1998 on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, which was in force at the time the supervisory board limited certain powers of the management board, and within the meaning of the notice of 10 July 2007 (paragraphs 65 *et seq.*).

*exists in a particular case is based on the evidence resulting from the presence of shareholders in previous years.*"<sup>21</sup>

43. The Commission has applied this principle to a large number of merger-related issues in the *a priori* analysis of cases of acquisition of minority participation such as to confer control<sup>22</sup>.
44. Under the circumstances, given what is still a very dispersed shareholding structure<sup>23</sup>, Electrabel had enough votes [...] (see paragraphs 78 *et seq.* below).
45. Given the attendance rate at CNR general meetings in the period 2000-2003 (i.e. the voting rights held by the shareholders present, represented or voting by post as a proportion of the voting rights as a whole, see Table 2 below), and the widely dispersed nature of the remaining shares, Electrabel has been assured since 23 December 2003 of having a majority at general meetings enabling it to secure adoption of the resolutions proposed by the management board, the main governing body of CNR, which Electrabel in any event controls [...] (see in particular paragraphs 78 *et seq.*). Table 2 below also contains a projection of the proportion of the votes at the shareholders' meeting that a shareholder with a stake of 47.92% of the voting rights (i.e. the percentage of voting rights held by Electrabel since 23 December 2003) would have enjoyed on the basis of the attendance rates at shareholders' meetings in the four years preceding the acquisition by Electrabel of the CNR shareholding held by EDF in December 2003.

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<sup>21</sup> To the same effect see paragraph 59 of the consolidated jurisdictional notice of 10 July 2007.

<sup>22</sup> See, in particular, the Commission's decisions in the following cases: COMP/M.2404 *Elkem/Sapa*, paragraph 7; IV/M.1157 *Skanska/Skancem*, paragraphs 14 *et seq.*; COMP/M.3091 *Konica/Minolta*, paragraph 6; IV/M.913 *Siemens/Elektrowatt*, paragraph 9; IV/M.942 *VEBA/Degussa*, paragraph 9; IV/M.1046 *Ameritech/Teledanmark*, paragraph 4; IV/M.1058 *Unichem/Alliance*, paragraph 6.

<sup>23</sup> In addition to Electrabel and CDC, there are close on 200 other shareholders, comprising local or regional authorities and chambers of commerce and industry (see footnote 5), which individually hold less than 1.9% of the voting rights within CNR (with the exception of the Département of Bouches du Rhône, which possesses 4.85% of the voting rights). In addition, although the other shareholders are all "public authorities", Electrabel, with just under 50% of the capital and voting rights, still controls the general meeting of shareholders for the following reasons: (i) among the "public authorities" there is CDC, which has concluded an agreement with Electrabel, and (ii) behind the "public authorities" there is a myriad of interests, and no single view expressing the general interest.

**TABLE 2: PARTICIPATION RATES AT GENERAL MEETINGS FROM 2000 TO 2003 AND PERCENTAGE OF VOTING RIGHTS PRESENT OR REPRESENTED HELD BY ELECTRABEL .**

	Ordinary GM of 27/06/00	OGM of 21/12/00	Combined (ord/extraord) GM 28/06/01	OGM of 27/06/02	OGM of 28/11/02	EGM of 28/11/02	OGM of 25/06/03	EGM of 25/06/03
Total number of votes	3 600 000	3 600 000	3 600 000	3 600 000	3 600 000	3 600 000	3 000 000	3 000 000
Total number of votes present or represented at GM	2 599 242	1 547 666	1 987 657	2 262 612	2 756 510	2 611 936	2 011 123	2 055 314
Participation rate (in % of the votes present or represented)	72.2%	43 %	55.2 %	62.9 %	76.6 %	72.6%	67%	68.5%
Percentage corresponding to 47.92% of the voting rights (in % of votes present or represented)	66.4%	100%	86.8%	76.1%	62.6%	66%	71.5%	70%

46. An analysis of voting at general shareholders' meetings also indicates that between 2004 and 2007 Electrabel by itself enjoyed a majority of the voting rights present or represented (see Table 3)<sup>24</sup>.

<sup>24</sup> In a reply to the Commission dated 7 April 2008, Electrabel stresses that "CDC does not exercise de facto joint control over CNR with Electrabel either, since it has transpired over the years that, in practice, the latter alone has a majority of the votes at CNR's general meetings and does not need the support of CDC".

**TABLE 3: SHARE OF ELECTRABEL AND CDC IN THE VOTING RIGHTS OF SHAREHOLDERS PRESENT AND REPRESENTED AT GENERAL MEETINGS IN THE PERIOD 2003-2007**

	OGM of 25 June 2003	OGM convened extraordinarily on 25 June 2003	EGM of 29 June 2004	Combined GM on 29 June 2004	OGM on 22 June 2005	OGM on 22 June 2006	Combined GM on 28 June 2007
Total number of voting rights of shareholders present or represented at the GM	2 011 123	2 055 314	2 561 825	2 630 387	2 500 502	2 748 504	1 553 455
Voting rights held by Electrabel	506 320	506 320	1 437 632	1 437 632	1 437 633	1 439 233	1 439 265
As % of the voting rights of shareholders present or represented	25.18%	24.63%	56.12%	54.65%	57.49%	52.36%	92.65%
Voting rights held by CDC	294 123	294 123	894 113	894 113	894 113	995 753	0
Voting rights held by Electrabel and CDC	800 443	800 443	2 331 745	2 331 745	2 331 746	2 434 986	1 439 265
As % of the voting rights of shareholders present or represented	39.80%	38.94%	91.02%	88.65%	93.25%	88.59%	92.65%

Source: Notification form for case COMP/M.4994 Electrabel/Compagnie Nationale du Rhône.

47. In its reply to the statement of objections, Electrabel contests the analysis the Commission sets out there.
48. Firstly, Electrabel contests the Commission's prospective approach to analysing developments in voting rights and shareholdings, which it considers to be out of line with established decision-making practice. It therefore underlines the need to adopt an approach in which the analysis carried out must be largely qualitative (and not merely quantitative, which, it claims, is the Commission's approach). In this context, Electrabel cites paragraph 59 of the notice of 10 July 2007 and the

Commission decision in the *MAN/Scania* case<sup>25</sup>, which, it claims, prove that the Commission used to apply Electrabel's preferred approach.

49. For this reason, Electrabel takes the view that it could not have detected the *de facto* acquisition of control over CNR until June 2007, when it was in a position to examine the situation prevailing during the 2004-2006 period. Electrabel argues that the Commission's decision-making practice requires that a majority be observed at the general meeting over at least three years, but taking 2007 as the starting point for this retrospective analysis: "*in so far as it transpires that Electrabel France was, in fact, able to count on a majority of the votes for its proposals at the general meetings held between 2004 and 2007, it appears that its de facto sole control over CNR has existed since 2007 in accordance with the Commission's decision-making practice, which requires that there be a constant majority at the general meeting over at least three years*"<sup>26</sup>.
50. In its reply to the statement of objections, Electrabel contends that attendances at the general meetings of CNR's shareholders between 2000 and 2003 are irrelevant, because CNR's main shareholder at that time was EDF, or in other words the French State itself, and the question of the acquisition of control arose only in 2007, the year in which Electrabel could conclude that it had been able to assemble a majority at CNR general meetings over the whole period 2004-2007<sup>27</sup>.
51. In support of its analysis, Electrabel mentions a series of cases in which the Commission decided to examine voting patterns in companies over the three years preceding the transaction in order to determine whether a concentration existed<sup>28</sup>.
52. Electrabel's argument is not well founded.
53. Firstly, at a formal level, it is based not on the notice of 2 March 1998, which was in force on December 2003, but on the notice of 10 July 2007. But the rule is the same in both notices.
54. Secondly, in any event, the approach proposed by Electrabel is manifestly incorrect, as it amounts to carrying out an *a posteriori* analysis that is not in line with the Commission's decision-making practice, which was very clear as to the need to conduct an *a priori* analysis at the time of the acquisition of the shareholding that might confer control.
55. In past decisions, and notably the *MAN/Scania* decision cited by Electrabel in the reply to the statement of objections, the Commission has indeed carried out such an analysis; but it did so in order to ascertain the concentrative character of the

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<sup>25</sup> Decision of 20.12.2006 in case COMP/M. 4336 - *MAN/Scania*.

<sup>26</sup> Notification form in case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*, paragraph 84.

<sup>27</sup> Reply, paragraphs 23 and 152.

<sup>28</sup> Commission Decisions of 28 August 2001 in case COMP/M.2532 – *Fiat/ Italenergia/Montedison*, paragraph 15; of 3 August 1993 in case IV/M.343 – *Société Générale de Belgique/Générale de Banque*, paragraphs 7-12; of 3 June 1997 in case IV/M.906 – *Mannesmann/Vallourec*, paragraphs 13-20; of 5 December 1997 in case IV/M.1046 – *Ameritech/Tele Denmark*, paragraph 4; of 22 December 1997 in case IV/M.1058 - *UniChem/Alliance Santé*, paragraph 6; of 4 February 1998 in case IV/M.1056 - *Stinnes/BTL*, paragraph 7; and of 12 March 2004 in case COMP/M.3330 – *RTL/M6*, paragraphs 7-12.

transaction, and thus its own powers, and was consequently seeking either (i) to examine changes in shareholders over the previous three years, so as to identify the parties exercising control prior to the operation<sup>29</sup>, or (ii) to refer to the established average of votes present and represented at the general meetings in order to establish the possible impact of the changes in capital in connection with which the Commission was notified of the operation in question<sup>30</sup>. In *MAN/Scania*, the Commission took account of the fact that, in a number of instances in the preceding years, the voting rights held by Volkswagen would not have been enough to obtain a majority at the annual general meeting of shareholders of MAN, and of other factors suggesting that a similar situation could arise again in the future.

56. Moreover, the Commission practice, reflected in paragraph 14 of the notice of 2 March 1998, confirms the fact that the analysis must be carried out *a priori*, on the basis of the data relating to the shareholders' attendance rates in the course of the preceding years. If this were not the case, it would necessarily mean that a company could exercise *de facto* control (without notification or approval) over another company for three years before notifying the Commission of the operation, on the basis that it would not be absolutely sure that it was exercising control until the three years were up.
57. It can thus be seen that during the three years preceding Electrabel's acquisition of its shareholding in EDF on 23 December 2003 (2000-2002), the rate of participation in CNR's general meetings (the share of voting rights held by the shareholders present, using a postal vote or represented by proxies) fluctuated between 43% and 76.6%<sup>31</sup>, in a context of widely dispersed shareholdings.
58. In fact, Electrabel, holding 47.92% of the voting rights since 23 December 2003, could certainly expect to obtain an absolute majority at CNR's general meetings from that date onward. For Electrabel to have an absolute majority at the general shareholders' meetings, the rate of attendance (percentage of voting rights held by the shareholders present, represented or voting by post) had to be below 95.84%. Given the rates of attendance in the three years preceding, which were well below that threshold, it was highly improbable that Electrabel would not have an absolute majority at the general meetings from 23 December 2003 onward.
59. If Electrabel had taken full account of the relevant decision-making practice developed by the Commission, as in its submissions it claims to have done<sup>32</sup>, it should have brought the matter to the Commission's attention by December 2003

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<sup>29</sup> Commission Decision of 3 August 1993 in case IV/M.343- *Société Générale de Belgique/Générale de Banque*, paragraphs 7 and 8.

<sup>30</sup> Commission Decisions of 3 June 1997 in case IV/M.906 - *Mannesmann/Vallourec*, paragraph 15; of 5 December 1997 in case IV/M.1046 - *Ameritech/Tele Danmark*, paragraph 4; of 22 December 1997 in case IV/M.1058 - *UniChem/Alliance Santé*, paragraph 6; of 4 February 1998 in case IV/M.1056 - *Stinnes/BTL*, paragraph 7; and of 12 March 2004 in case COMP/M.3330 - *RTL/M6*, paragraph 10.

<sup>31</sup> The reports on the general meetings, whether ordinary, extraordinary or combined, show the following participation rates over the 2000-2003 period: 7.2% (ordinary general meeting of 27 June 2000), 43% (ordinary general meeting of 21 December 2000), 55.2% (combined general meeting of 28 June 2001), 62.9% (ordinary general meeting of 27 June 2002), 76.6% (ordinary general meeting of 28 November 2002), and 72.6% (extraordinary general meetings of 28 November 2002). See Table 2 above.

<sup>32</sup> As spelt out in the notice of 2 March 1998 (paragraph 14).

at the latest, when it acquired further shares from EDF that brought its total share to 49.95% of CNR's capital and to 47.92% of the voting rights; it might have done so by consultation, as it did in 2007. As in 2007, the Commission would then have applied the established decision-making practice to confirm that Electrabel was acquiring sole control of CNR and was thus obliged to notify the transaction.

60. Secondly, in the context of the alternative approach which it prefers, Electrabel argues that the low rate of participation in CNR's general meetings between 2000 and 2002 is irrelevant, as it reflects the trust that small public shareholders had in EDF, which was CNR's main shareholder at that time.
61. Electrabel provides no evidence that the small shareholders placed such trust in EDF. On the contrary, it should be stressed that EDF had not availed itself of its voting rights within CNR (on the board of directors and at the general meeting) since 1 April 2001<sup>33</sup>. It is therefore rather difficult to argue, as Electrabel does, that the small public shareholders trusted in a shareholder which was no longer exercising its rights as a shareholder in CNR.
62. Thirdly, still in the context of its alternative approach, Electrabel takes the view that the participation rate in the above-mentioned years is not representative, in that Electrabel could legitimately expect the rate of participation in general meetings to rise after 23 December 2003, the date from which it held 47.92% of voting rights in CNR, after its acquisition of EDF's shareholding.
63. According to Electrabel, it was legitimate to expect an increase in the rate of participation in general meetings, given that, since 2003, several public shareholders had openly declared their opposition to the arrival of a private shareholder at CNR and had expressed their fears as to whether the latter would continue to be a public corporation; moreover, such concerns continued to exist several years after Electrabel's acquisition of a holding in CNR.
64. Electrabel argues that a significant response on the part of the other public shareholders seemed likely, given that the public shareholders as a group shared common links and strategic interests as shareholders of CNR.
65. Electrabel's argument is not well founded.
66. Firstly, Electrabel provides no concrete information concerning the opposition and the fears supposedly expressed as of 2003 in response to Electrabel's acquisition of a holding in CNR.
67. The sole instance of this kind pointed to by Electrabel is the concern expressed at a meeting of the supervisory board on 7 July 2005, which is a long time after 2003<sup>34</sup>.
68. Moreover, in the course of that meeting, no-one expressed any concern at or opposition to the fact that Electrabel was a shareholder in CNR. At the point during the meeting when the shares of the Département of Hauts-de-Seine were to

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<sup>33</sup> In case COMP/M.1853 *EDF/EnBW*, EDF undertook not to exercise its rights as of 1 April 2001 and to entrust them to a proxy.

<sup>34</sup> At the hearing, the Commission asked Electrabel to quote the exact statements made by local public shareholders in CNR expressing opposition to or concerns about Electrabel as of 2003. Electrabel was unable to do so and merely referred the Commission to the minutes drawn up by CNR's governing bodies.

be transferred, the members representing the employees recalled that under the Murcef Law these shares could not be transferred to Electrabel and that the party to which they were to be sold should be clearly indicated<sup>35</sup>. In reply, a member representing CDC said that the party acquiring the securities would be CDC<sup>36</sup>, and another member representing Electrabel declared that the greater part of CNR would stay in public ownership under the Murcef Law<sup>37</sup>. The representative of the Provence Alpes Côte d'Azur Region stated that employees and neighbours should be reassured that CNR would remain in public ownership and would continue to promote the common good. And far from expressing reservations with regard to Electrabel, the same representative declared that that *"does not mean that private partners cannot share a concern for the common good"*<sup>38</sup>.

69. Secondly, Electrabel's argument implies that CNR's public shareholders constitute a community with common interests. However, it does not supply any concrete evidence in favour of the existence of such a community.
70. First of all, the efforts of French legislators to maintain the mainly public structure of CNR's capital do not imply the existence of a community of interests or of any defence of a "common interest" shared by public shareholders such as might thwart Electrabel's wish to exercise control over CNR.
71. In this context, suffice it to point out that the rate of approval of resolutions at the general meetings, as notified by Electrabel, has always been very high.
72. Moreover, Electrabel fails to consider the fact that, as regards a community of interests among the public shareholders, one essential public shareholder, CDC (which held 29.8 % of voting rights on 23 December 2003), allied itself with Electrabel [...]\*.
73. Moreover, it is noteworthy that, at the general meeting of 25 June 2003, Electrabel's representatives on the supervisory board were elected with majorities as large or larger than the representatives of the public bodies, which contradicts one of the essential points in Electrabel's arguments, that is, the possibility of the

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<sup>35</sup> The members representing the employees on the supervisory board were Mr [...]\* and Mr [...]\*. Mr [...]\* *"expressed his astonishment at the recent press release announcing the possible transfer of the shares of the Département of Hauts-de-Seine which, in his opinion, called the Murcef Law into question."* Mr [...]\* *"recalled that, in the present stage of negotiations on the end of the general operating agreement, CNR must be clear in its communications and must therefore indicate that Caisse des Dépôts et Consignations will acquire the securities, if such is the case, in order to ensure that the majority share of capital remains in public ownership"* (p. 3 of the minutes of the supervisory board meeting of 7 July 2005).

<sup>36</sup> Mr [...]\* (CDC) *"noted that the party acquiring the securities was Caisse des Dépôts et Consignations, and that its shareholding in the company would increase from 29% to 32.5%"* (p. 3 of the minutes of the supervisory board meeting of 7 July 2005).

<sup>37</sup> Mr [...]\* (Electrabel) *"confirmed what the previous supervisory board had already been told, that there would continue to be a majority public holding in CNR, in accordance with the law; only Parliament could change this. In his view, the policies of the Suez group had not changed. Suez was satisfied with the existing partnership"* (p. 3 of minutes of the supervisory board meeting of 7 July 2005).

<sup>38</sup> Mr [...]\* *"thought employees and neighbours should be reassured that CNR would remain in public ownership and retain a concern for the common good, which did not mean that the private partners could not also be concerned for the common good"* (p. 4 of the minutes of the supervisory board of 7 July 2005).

other shareholders forming a coalition to prevent Electrabel from acquiring greater power within CNR, supposedly an undesirable outcome<sup>39</sup>.

74. Furthermore, it is worth noting that at CNR's general meeting on 25 June 2003 the public shareholders other than CDC, far from presenting a united front, displayed their differences when electing the members of the supervisory board. Several local public shareholders criticised the fact that the three posts on the board set aside for the local public bodies had been divided up in advance between (i) the Provence Alpes Côte d'Azur Region, (ii) the Rhône-Alpes Region, and (iii) the Département of Bouches du Rhône<sup>40</sup>. Consequently, other representatives of local public bodies stood for election to the supervisory board<sup>41</sup> against those proposed by the chairman of the general meeting.
75. Finally, it should also be pointed out that, in contrast to what Electrabel suggests, the other public shareholders (apart from CDC) have not become systematically more assiduous in attending meetings since December 2003.
76. On the one hand, it must be noted that, for example, the three main public shareholders, representing a total of 10.13% of voting rights of the CNR (the Département of Bouches-du-Rhône accounting for 4.85%, the Département of Hauts-de-Seine for 3.39% and the Département of Seine-Saint-Denis for 1.89%), abstained or were absent (and in some cases unrepresented) at the general shareholders' meetings held in 2004 (29 June) and 2005 (22 June)<sup>42</sup>.
77. On the other hand, the fluctuations registered in the attendance rate of the general shareholders' meetings held since 2003 are, essentially, explained by the behaviour of CDC: on 29 August 2003, CDC acquired the stake held by SNCF (which was not represented at the shareholders' meeting of 25 June 2003), CDC later increased its stake, and, finally, CDC was not represented at the shareholders' meeting of 28 June 2007. These fluctuations are therefore not linked to a change in the behaviour of the local public bodies.

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<sup>39</sup> See p. 10 of the minutes of the extraordinary general meeting of 25 June 2003. The successful candidates obtained the following percentages in favour: Mr [...] (Provence Alpes Côte d'Azur Region), 99.6%; Mr [...] (Electrabel), 96.9%; Mr [...] (CDC), 96.8%; Mr [...] (Electrabel), 96.2%; Mr [...] (CDC), 95.5%; Mr [...] (Electrabel), 95.2%; Mr [...] (Département of Bouches du Rhône), 93.7%; Mr [...] (Rhône-Alpes Region), 91.1%; and Ms [...] (CDC), 76.7%. Six other candidates, all of whom represented local public bodies, were not elected.

<sup>40</sup> See pp. 3 to 6 of the minutes of the extraordinary general meeting of 25 June 2003. Mr [...]\*, representing one of the local public bodies with shares in CNR, criticised the proposal put forward by the chairman of the general meeting, who was also CNR's CEO, to share out the three seats on the supervisory board reserved for local public bodies between the Provence Alpes Côte d'Azur Region, the Rhône-Alpes Region and the Département of Bouches du Rhône. Mr [...]\* stated that he "*expected ... a discussion to be held between the public bodies representing the regions of Isère, Drôme, Bouches du Rhône and Saône-et-Loire, the main purpose of which would be to ensure that CNR was properly represented along the whole course of the river. According to the proposed arrangements, CNR would be represented solely by public bodies to the south of Montélimar, a geographic representation which entirely failed to take account of the important interests of public bodies in the north*". Mr [...]\*'s remark was approved by [five representatives of local authorities]\*.

<sup>41</sup> See p. 9 of the minutes of the extraordinary general meeting of 25 June 2003. The persons concerned were [six candidates]\*.

<sup>42</sup> Notification form in case COMP/M.4994 - *Electrabel/Compagnie Nationale du Rhône*, paragraph 81.

2) **Since 2003 Electrabel has held an absolute majority on CNR's management board and has had the means to keep that majority**

78. The rules on the appointment of the members of the management board laid down in the articles of association of CNR and the Agreement between Electrabel and CDC guarantee the presence of two members of Electrabel out of the three comprising the management board, which means that Electrabel has sole control over CNR. [...]\*. With six of the 13 seats on the supervisory board, CDC and Electrabel can determine the membership of the management board by using their blocking minority (given that the appointment of members of the board of directors calls for a two-thirds majority on the supervisory board, that is, nine members out of 13).
79. CNR's other governing body, the supervisory board, on which neither Electrabel nor CDC constitute a majority, either separately or jointly [...]\*, has to give its approval for certain decisions proposed by the management board.
80. However, as already pointed out (see paragraph 38), the measures which the supervisory board is required to approve are not such as to enable the latter to exert a determining influence on CNR's strategy.
81. Secondly, it is very clear that in the event of a conflict between these two governing bodies, the conflict is resolved by the general meeting, acting by a majority of votes of the shareholders that are present or represented, so that decision-making power ultimately resides in the general meeting<sup>43</sup>. Given the weight of its share of voting rights and the dispersal of the other shareholders, Electrabel is in a position to ensure that its views prevail at general meetings.
82. In its reply to the statement of objections, Electrabel reiterates that the general meeting really is the body in which ultimate decision-making power resides in the event of a conflict between the governing bodies (the management board and the supervisory board). It concludes from this that developments connected with the fact that Electrabel holds a majority on the management board have no bearing on an analysis of the case. This argument does not contradict the arguments put forward by the Commission, which views control over the general meeting as an essential aspect of the acquisition of control.
83. However, to continue the analysis of the management board taken in isolation, suffice it to recall here (i) that the management board is the vital body which manages CNR's activities and determines its business policy, and that it is under the control of Electrabel<sup>44</sup>, and (ii) that since 8 July 2003, and without any interruption since that time, two of three members of the management board have represented Electrabel. Electrabel did not deny this fact either in its reply to the statement of objections or in the course of the hearing.

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<sup>43</sup> See the notification form in case COMP/M.4994 - *Electrabel/Compagnie Nationale du Rhône*, paragraph 76.

<sup>44</sup> CNR's articles of association state that "*the company shall be headed by a management board with three members*" (Article 15). The management board has "*the most extensive powers to take action under any circumstances on behalf of the company, the only limiting factor being the objects of the company defined in Article 3*" (Article 18-1).

84. In its reply to the statement of objections, Electrabel adduces the existence of the Agreement as evidence that Electrabel knew it was unable to control CNR on its own<sup>45</sup>.
85. In fact, as demonstrated in the statement of objections, whilst the Agreement does [...]\*. The issue raised by Electrabel would be relevant only if the Agreement had clearly conferred on CDC a veto on the nomination of the members of the governing bodies under Electrabel's control, which is not at all the case.
86. In fact, [...]\* the Agreement between Electrabel and CDC also prevents CDC and the other shareholders from concluding a shareholders' agreement that may give them *de jure* control over CNR.

**3) The Murcef Law does not prevent Electrabel from acquiring control over CNR**

87. In its reply to the statement of objections, Electrabel stresses that the purpose of the Murcef Law is to prevent any private operator from holding more than 50% of the capital or voting rights of CNR. Electrabel considers that this is an additional indication showing that Electrabel had not acquired *de facto* control over CNR.
88. Electrabel's argument is not well founded.
89. The French legislature's desire to keep the majority of the shares in CNR in public ownership is a question separate from that of the acquisition of control under Community merger control law. That there may be such an intention does not in any way mean that there cannot be control, and in particular *de facto* control, within the meaning of merger control law.
90. According to Electrabel, the Commission considered in *Samsung/AST* that Samsung did not acquire control of AST in December 1995 because there was a clause in a shareholders' agreement prohibiting the acquisition by Samsung of more than 49.9% of the capital up to 15 December 1998. Given the importance that the Commission attached in that case to a contractual limitation, Electrabel argues, it must grant even greater importance to a legal limitation like the one contained in the Murcef Law.
91. The *Samsung/AST* case cited by Electrabel in fact contradicts Electrabel's argument as regards the importance to be attached to the Murcef Law. In *Samsung*, the contractual limitation preventing the acquisition of more than 49.9% of the capital of AST up to 15 December 1998 did not prevent the Commission from concluding in its decision that Samsung had acquired control over AST as of January 1996<sup>46</sup>.

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<sup>45</sup> As regards relations between CDC and Electrabel, the latter does not contest, either orally or in writing, the Commission's analysis excluding the possibility of joint control over CNR by the two companies. This point was raised at the hearing by the representative of France, and Electrabel has confirmed that it does not argue that there might have been joint control of CNR by CDC and Electrabel.

<sup>46</sup> Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EEC) No 4064/89 (case IV/M.920 - *Samsung/AST*), paragraph 8: "On that basis, it can be concluded that as the Commission established in its decision of 26 May 1997 and as the parties have recognised, the acquisition of control of AST by Samsung, within the meaning of Article 3(3) of the Merger Regulation, took place at least in January 1996."

92. Another Commission precedent also shows that a law prohibiting the acquisition of a majority of the voting rights in a given company, such as the Murcef Law, is not incompatible with the acquisition of *de facto* control. In case M.3330 *RTL/M6*<sup>47</sup>, a French law prohibited any single natural or legal person, acting alone or in concert, from holding more than 49% of the capital or the voting rights of M6, a national television channel. RTL held 48.8% of the capital of M6, and the French broadcasting regulator, the Conseil Supérieur de l'Audiovisuel, had restricted RTL's share of the voting rights to 34%. But RTL notified the acquisition of *de facto* sole control, and the Commission found that RTL did indeed exercise sole control, in the light in particular of the dispersion of the remaining shareholdings and of the prospective analysis carried out.
93. Lastly, Electrabel itself considers that it acquired *de facto* control over CNR in 2007<sup>48</sup>: the Murcef Law was still in force then, as it is now. This clearly shows that the Murcef Law could not prevent the acquisition of *de facto* control of CNR by a private shareholder.

4) **Since 2003, having taken over the industrial role played by EDF within CNR, Electrabel has been CNR's only industrial shareholder and it has been playing a central role in the latter's operational management**

94. This argument is based on two separate facts: (i) EDF's withdrawal from the operational management of CNR and (ii) Electrabel's takeover of the industrial role and of operational management.
- *EDF's withdrawal from the operational management of CNR*
95. As CNR's sole industrial shareholder, Electrabel has taken over the industrial role formerly played by EDF. Since 1948, CNR was bound by contract to EDF as regards the running of its hydroelectric plants. Moreover, EDF held a sixth of CNR's capital and had a representative on its board of directors.
96. In the context of the acquisition in 2001 of joint control over EnBW (together with OEW)<sup>49</sup>, EDF undertook to ensure that CNR would be enabled to be an entirely independent electricity producer, that is, that CNR would be able to run its power plants and sell the electricity produced independently.
97. To this end, EDF undertook, *inter alia*, to refrain henceforth from exercising its voting rights at general meetings except through an independent proxy, and to refrain from having a representative on the board of directors. At the same time, it committed itself to purchasing, between 1 April 2001 and 1 April 2006, at CNR's request, a proportion of the electricity produced by CNR, to enable the latter to enter the electricity market gradually.
98. In its reply to the statement of objections, Electrabel argues that the statement of objections pays no attention to the active role played by EDF up to the end of

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<sup>47</sup> Commission Decision of 12 March 2004 in case COMP/M.330 – *RTL/M6*, paragraphs 7 to 12.

<sup>48</sup> See for instance paragraph 140 of Electrabel's reply to the statement of objections.

<sup>49</sup> Commission Decision of 7 February 2001 in case COMP/M.1853 – *EDF/EnBW*. See in particular paragraphs 91 and 92 and the commitments made by EDF and attached to the Decision.

2006: it says that EDF played an essential role in the operational management of CNR until the end of 2005, and remained a very significant commercial partner of CNR until the end of 2006.

99. Electrabel's argument is not well founded.
100. Firstly, the existence of agreements between EDF and CNR is not in contradiction with the fact that CNR is able to define its industrial and commercial policy independently of EDF. Proof of this is provided by the fact that EDF undertook, as stated in paragraph 96, that CNR would be given the means to become an independent producer of electricity as of 1 April 2001. Moreover, Electrabel itself acknowledges that EDF no longer exercised a determining influence on CNR after 2001<sup>50</sup> and that CNR was responsible for the main choices to be made as regards its industrial management and business decisions<sup>51</sup>.
101. Secondly, as noted below, since its annual report on the 2003 financial year, Suez (of which Electrabel is a subsidiary) has drawn attention to the fact that Electrabel has taken over operational control of CNR, and has included CNR's power stations in Electrabel's electricity generating capacity<sup>52</sup>.
102. Finally, as regards the purchasing of electricity from EDF, Electrabel in its reply to the statement of objections fails to mention that such purchases were not by any means obligatory for CNR, but were, rather, carried out on a voluntary basis according to the wording of the commitments entered into by EDF in the context of the EDF/EnBW merger<sup>53</sup>. Moreover, far from making CNR dependent on

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<sup>50</sup> See Electrabel's reply of 7 April 2008 to question 2 in the Commission's request for information of 26 March 2008, which states that EDF did lose control over CNR in 2001, when the Gentot Committee set up under Section 50 of the Law of 10 February 2000 laid down the conditions for the review of the protocols governing industrial and commercial relations between the two companies, so that CNR could gradually become an independent producer of electricity in its own right. Moreover, EDF renounced the right to exercise the voting rights associated with the CNR shares which it held, and entrusted responsibility for these to a trustee.

<sup>51</sup> Paragraph 90 of the CO notification form in case COMP/M.4994 - *Electrabel/Compagnie Nationale du Rhône* states as follows: "*In accordance with the joint declaration by CNR and EDF on the industrial aspects of CNR's transformation into an independent producer in its own right, the companies have ceased joint operation of the transferred plants. They have thus defined the conditions under which the planning and management of production would be carried out on a strictly temporary basis by EDF for CNR and the conditions under which CNR would entrust EDF for a transitional period with specific tasks to do with the operation of the hydroelectric plants on the Rhône, leaving CNR with the responsibility for making major choices on industrial management; these tasks would be entirely independent of the commercial decisions to be taken by CNR.*"

<sup>52</sup> Suez's activity and sustainable development report for 2003. See in particular pp. 38 and 41.

<sup>53</sup> EDF's commitment, which is attached as an annex to the above-mentioned decision, states: "*EDF's services shall be limited to the technical operation and maintenance of these plants. These services shall not comprise functions related to the optimisation (dispatching) or the commercialisation of the production. Functions of this kind shall belong to CNR and be implemented by CNR's own personnel.*" "*EDF undertakes not to make any claim to the electricity generated by CNR or part thereof as from 31 March 2001 .... Accordingly, CNR will be in a position to act freely and independently, on its own or with partners, on the eligible market, the wholesale market, with the RTE and with other French and European producers. Furthermore, in order to allow CNR progressively to develop the marketing of its entire production, EDF has offered CNR a purchase guarantee on the terms and conditions set out hereunder. EDF undertakes to purchase, between 1 April 2001 and 1 April 2006, upon request of CNR, part of its production as necessary to allow CNR progressive entry on the market.*"

EDF, these arrangements were designed to enable CNR to enter the electricity markets, as is set out in the text of the commitment. Finally, Electrabel fails to provide any details of the amounts of electricity purchased by EDF. There is thus no indication of what proportion of the electricity purchased from CNR is accounted for by EDF.

- *Electrabel's assumption of the industrial role and operational management*

103. After taking a stake in CNR, Electrabel acquired EDF's shareholding on 23 December 2003. This acquisition complements the cooperation with CNR which started in 2000<sup>54</sup>.
104. This cooperation arose in connection with the loosening of ties between EDF and CNR and was stepped up when, in April 2001 (see above), CNR became an electricity producer independent of EDF and was thus able to define its own industrial and commercial strategies. This process, together with Electrabel's acquisition of a holding in CNR in 2003, led to Electrabel's taking over the industrial role and operational management which previously fell to EDF within CNR. As of 2003, Electrabel took over operational control over CNR, considering CNR's power stations as part of its own electricity generation capacity.
105. Electrabel's takeover of the industrial role and operational management within CNR was facilitated by the signing on 28 November 2000 of a framework agreement between Electrabel and CNR. The purpose of the framework agreement, apart from the conclusion of a number of commercial agreements and agreements on assistance, was to set up a joint subsidiary, Energie du Rhône (EDR). On 28 August 2001, CNR and Electrabel signed an associates' agreement laying down the terms of their commercial relations within EDR.
106. EDR plays a vital role in the activities of CNR. This consists in: (i) identifying and analysing useful market segments, (ii) prospecting, researching and identifying potential clients, (iii) canvassing those customers and presenting them to Electrabel France and CNR, (iv) assisting in the preparation of offers and contracts, (v) providing the commercial and contractual back-up for customers, and (vi) preparing the necessary invoicing particulars.
107. Under the associates' agreement already referred to, the eligible customers canvassed by EDR are presented first to CNR. If CNR refuses or is unable to supply the customer, then the customer is introduced to Electrabel France.

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<sup>54</sup> The minutes of the general meeting of CNR held on 27 June 2000 confirm that, in view of the loosening of its ties with EDF, the link-up between CNR and a major electricity generator is essential: (p. 7) : "He [the chairman of the board of directors] reminded shareholders that, in addition to the partnership with Caisse des Dépôts, he had imagined a strategic global partnership with the participation of private minority capital. He proposed that the majority nature of CNR's public capital be laid down in law and this was accepted by the Suez Lyonnaise des Eaux/Electrabel group, which had shown the greatest interest ... He [the chairman of the board of directors] added that he had made this proposal since he was convinced that the association with a major electricity generator, in whatever form, was indispensable to CNR both at technical level and at commercial level". This strategic approach was then regularly confirmed at general meetings: see the minutes of the general meeting of 27 June 2002 (p. 4), at which the Government representative made the following statement: "The rationale for the industrial and commercial project, which takes the form of a partnership with Suez in Energie du Rhône, remains valid; the aim is to enable CNR to play its role as the second independent French producer. This is why a rapprochement with an industrial partner such as Suez would no doubt be beneficial."

108. CNR and Electrabel hold 51% and 44% respectively of the capital (and voting rights) of EDR, with CDC holding the remaining 5%. Under the articles of association of EDR (Article 16.1), its board of directors comprises two Electrabel representatives and three representatives, including the chairman, from CNR.
109. However, even though CNR holds 51% of the capital and voting rights in EDR as well as an absolute majority on the board of directors, Electrabel exerts a determining influence over EDR.
110. For one thing, a certain number of strategic decisions, such as the approval of the budget, the appointment of employees to, and their dismissal from, management functions, and proposals to the general meeting to appoint or dismiss the chairman on a proposal from CNR, require unanimity within the board of directors. For another, the general manager of EDR, who is responsible for the company's general operational management, is appointed unanimously by the board of directors on a proposal from Electrabel.
111. As well as setting up EDR, Electrabel and CNR signed simultaneously or subsequently a series of technical and commercial partnership agreements to increase their cooperation, mainly in 2001 and 2004<sup>55</sup>.
112. At the ordinary general meeting of CNR on 25 June 2003, CNR's chairman stated that *"CNR started to give consideration to bringing together a commercial and an industrial partnership once it knew that Electrabel would acquire a shareholding. Electrabel thus became our main commercial partner with close on [30-40]\* % of sales and the rapid expansion of Energie du Rhône."* The rapid expansion and importance of EDR in terms of electricity sales are confirmed by the ratio of the volume of electricity sold by EDR to the volume of electricity sold by CNR over the period 2002-2007 (see table below)<sup>56</sup>:

Share (as %) of the volume of electricity sold by EDR in the volume of electricity sold by CNR					
2002	2003	2004	2005	2006	2007
[0-5]*	[5-10]*	[10-20]*	[30-40]*	[20-30]*	[20-30]*

113. Electrabel claims in its reply to the statement of objections that it did not fully take on the industrial role and operational management until 2006, as CNR in fact concluded important long-term partnerships with both EDF and Electrabel from 2001 onward.
114. Firstly, Electrabel claims that the issue of sole control over the joint subsidiary, EDR, is irrelevant. It points out that the Commission was notified of the establishment of EDR, and that on 29 November 2002 it granted its authorisation

<sup>55</sup> They include contracts and agreements (see e-mail from Electrabel dated 13 October 2008) concerning (i) the sale of electricity by CNR (framework contract for purchasing options on forward contracts for buying electricity (28 August 2001), a supply and guarantee contract (28 August 2001) and an off-take contract (28 August 2008)); (ii) a remote control project (26 September 2004); (iii) a contract for the sale of TUVV EE02 certificates (11 October 2006); and (iv) a contract for the sale of green certificates by CNR to Electrabel (31 March 2008).

<sup>56</sup> Source: Electrabel's reply of 13 October 2008 to the Commission's request for information of 29 September 2008.

to an agreement on the setting up of a "cooperative" rather than a "concentrative" joint venture. Electrabel argues that this operation cannot, therefore, be considered as having resulted in any form of exclusive control by Electrabel over CNR.

115. Electrabel therefore argues that the analysis set out in the statement of objections contradicts the Commission's analysis in its letter closing the examination of the establishment of EDR. It points out that the Commission had noted that the fact that CNR prioritised supplying customers canvassed by EDR represented a restriction of competition within the meaning of Article 81(1) of the EC Treaty, but had nonetheless granted an individual exemption under Article 81(3) of the EC Treaty for a length of time equal to the period of EDF's gradual divestment of its holdings in CNR.
116. Furthermore, Electrabel takes the view that the statement of objections fails to explain how this agreement was supposed to influence the analysis of the facts on 23 December 2003.
117. Electrabel's argument is not well founded.
118. Firstly, it should be recalled that Electrabel exercises decisive influence over EDR, a fact which it does not deny.
119. Secondly, as noted in the statement of objections<sup>57</sup> and as mentioned above, the chairman of CNR pointed out at the general meeting of 25 June 2003 that as soon as Electrabel took a holding in CNR, EDR underwent a rapid expansion. This is an element in Electrabel's key role in CNR's operational management.
120. Thirdly, as Electrabel indicates in its reply to the statement of objections, the establishment of EDR was notified in accordance with Article 81 of the EC Treaty on 21 December 2001, and the Commission's authorisation dates from 29 November 2002, that is, before Electrabel took a holding in CNR in June 2003 and acquired EDF's shareholding in CNR in December 2003. Thus the new development was indeed Electrabel's acquisition of a holding in CNR, which led to Electrabel's acquiring 47.92% of voting rights on 23 December 2003; EDR must be taken into account in this context.
121. At the hearing, Electrabel listed other factors which it said supported its view that it had not acquired control over the CNR before 2007: (i) the complete withdrawal of EDF from CNR, which took place only at the end of 2006, (ii) the fact that Electrabel became the only industrial shareholder, and the strengthening of commercial cooperation between Electrabel and CNR, and (iii) the launch of a joint brand, "EBL France – CNR", in April 2007.
122. These elements, taken separately or together, do not demonstrate that Electrabel acquired *de facto* sole control only in 2007.
123. Firstly, the argument as to the complete withdrawal of EDF at the end of 2006 cannot be accepted because, as demonstrated in paragraph 100 and acknowledged by Electrabel itself, the agreements concluded between EDF and CNR for the period 2001-2006 could not have granted EDF a decisive influence over CNR from 2001. In any event, EDF had ceased to be a shareholder in CNR on 23 December 2003, the date on which its holding in CNR was effectively transferred to Electrabel. Thus the agreements concluded with EDF could not

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<sup>57</sup> Paragraph 55 of the statement of objections.

prevent Electrabel from acquiring control of CNR from 23 December 2003 onward.

124. Secondly, it is not correct to state, as Electrabel does, that Electrabel became the only industrial shareholder in CNR in 2007: that happened in 2003.
125. Thirdly, as stated above, most of the industrial and commercial agreements between Electrabel and CNR were concluded between 2001 and 2004, and the strengthening of such agreements was not an event triggering the acquisition of *de facto* sole control over CNR.
126. Finally, Electrabel provides no reasoning to explain why the launch of a common commercial brand by Electrabel and CNR in 2007 should constitute an event triggering the acquisition of control by Electrabel over CNR. Indeed it can be argued that the launch of the brand was possible precisely because Electrabel already controlled CNR.

5) **Since 2004 CNR has been regarded *de facto* as forming part of the Suez group both by the managers of CNR and by the managers of Suez**

127. A number of CNR internal documents, including the minutes of the management board and of the supervisory board, reveal that in 2004 CNR had embarked on a group strategy vis-à-vis Suez. CNR's participation in the Suez group is mentioned repeatedly, as the following extracts show.
128. At its meeting on 19 March 2004, the management board decided to put before the next general meeting *"a resolution opposing the idea of a capital increase that will be reserved for employees since this arrangement is not adapted to an unlisted company that is the subsidiary of a large industrial grouping. By contrast, CNR employees should be able to have access to the SPRING plan put in place by the Suez group (under conditions still to be determined)"*. At that same meeting, the management board made the point that, as regards retirements, *"CNR and Suez Electrabel ... are going to meet a number of stakeholders to defend the group's point of view as expressed in particular in the UFE [Union Française de l'Electricité] compromise"*<sup>58</sup>.
129. The management board meeting on 18 January 2005 discussed the representation of the Suez group within the UFE. The intention was that the Suez group would be represented by CNR, SHEM and Suez<sup>59</sup>.
130. At the supervisory board meeting on 8 December 2005, which was attended for some of the time by Mr [...] of Suez, the latter emphasised *"the determination of Suez to develop its energy activities in France by using CNR as the flagship for the development of renewable energies and external growth projects in this strategic field"*<sup>60</sup>.

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<sup>58</sup> Minutes of the meeting of the management board on 19 March 2004, p. 2.

<sup>59</sup> Minutes of the meeting of the management board on 18 January 2005, p. 2.

<sup>60</sup> Minutes of the meeting of the supervisory board on 16 March 2006, p. 7. Statement by Mr [...] made at the previous meeting of the supervisory board, on 8 December 2005, and referred to by Mr [...] of the CNR management board, at the meeting of the supervisory board on 16 March 2006.

131. At the supervisory board meeting on 28 September 2006, when discussing the GDF/Suez merger, the representative of Electrabel, Mr [...]\*, stated that *"CNR was involved in this planned merger. Indeed, it must participate in this development like all the companies of the Suez and Gaz de France group"*<sup>61</sup>.
132. An internal Electrabel memo of 10 November 2006 concerning CNR's financing and investment policy suggests that *"in line with a group strategy, CNR could invest some of its cash resources in the Suez/Electrabel group"* and that *"as regards financing, CNR could have recourse to the group for any new financing"*<sup>62</sup>.
133. At the supervisory board meeting on 8 December 2006, one of the CNR directors, Mr [...]\*, spoke of *"the participation of CNR in the insurance programmes of the Suez group and in the mutualised tranche of the civil liability programmes"*<sup>63</sup>.
134. At the general meeting on 28 June 2007, [a member]\* of the CNR supervisory board, [...]\*, took the view that CNR *"now occupies an exemplary position within the Suez group"*<sup>64</sup>. [A member]\* of the management board, Mr [...]\*, when discussing international expansion, stated that *"these (international) markets have been gained by CNR on its own or in a consortium with other Suez group subsidiaries"*; he welcomed the *"truly synergistic work done by CNR and a number of Suez group subsidiaries"*<sup>65</sup>.
135. Lastly, at the supervisory board meeting on 13 December 2007, Mr [...]\*, one of the directors of CNR, *"had been entrusted with a coordination task so as to avoid any contradiction between the development plans of CNR and Compagnie du Vent [a wind energy company recently acquired by Electrabel]"*<sup>66</sup>.
136. At that same meeting, Mr [...]\*, a representative of Electrabel, asked that CNR's hydrological development projects be approved in *"a document formally setting out the matters at issue and the amounts with a view to their approval by Suez and by the supervisory board"*<sup>67</sup>; he also stressed *"the synergy achieved between the design departments of CNR and the Suez group"*<sup>68</sup>.

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<sup>61</sup> Minutes of the meeting of the supervisory board on 28 December 2006, p. 20.

<sup>62</sup> Internal memo from Electrabel's Treasury and Finance Department entitled "CNR financing and investment policy", addressed to Messrs [...]\*.

<sup>63</sup> Minutes of the meeting of the supervisory board on 8 December 2006, p. 10.

<sup>64</sup> Minutes of the combined (ordinary and extraordinary) general meeting of shareholders of 28 June 2007, p. 4.

<sup>65</sup> Minutes of the combined (ordinary and extraordinary) general meeting of shareholders of 28 June 2007, p. 5.

<sup>66</sup> Minutes of the meeting of the supervisory board on 13 December 2007, p. 8.

<sup>67</sup> Minutes of the meeting of the supervisory board on 13 December 2007, p. 9.

<sup>68</sup> Minutes of the meeting of the supervisory board on 13 December 2007, p. 10.

137. Moreover, the annual activities reports of Suez and Electrabel, which are public documents, confirm the information from internal documents that has been noted in the preceding paragraphs.
138. The Suez annual report for 2003 (situation as at 31 December 2003) states on page 38 that: "*In addition to these three subsidiaries, the Group holds equity stakes in Europe which have had a varied experience in 2003: in France, Electrabel took operational control of Compagnie Nationale du Rhône (CNR)*". On page 41, the same 2003 annual report presents a graphic entitled "*Electrabel: renewable energy capacity*" that includes CNR's hydraulic production capacity.
139. Similarly, Electrabel's annual report for 2004 (situation as at 31 December 2004) includes CNR's electricity production capacities within those of Electrabel, and also states that Electrabel provides operational management for CNR<sup>69</sup>.
140. Electrabel states in its reply to the statement of objections that the Commission has interpreted these documents incorrectly.
141. Electrabel challenges the relevance of the extracts quoted by the Commission. Electrabel stresses that all but one relate to statements made after 2004. Moreover, Electrabel points out that some of them relate to specific arrangements within the Suez group whose application to CNR had been envisaged (retirement scheme for CNR employees, financing policy within the Suez group), but which in fact still did not apply to CNR at the end of 2006. Lastly, according to Electrabel, the statement of objections did not take into account other statements that contradicted the extracts cited there.
142. Electrabel's arguments are not well founded.
143. First of all, it should be noted that Electrabel does not discuss, and so does not contest, the content of three extracts.
144. The first extract concerns the meeting of the management board on 19 March 2004 (paragraph 58 of the statement of objections): "*At that same meeting, the management board made the point that, as regards retirements, 'CNR and Suez Electrabel ... are going to meet a number of stakeholders to defend the group's point of view as expressed in particular in the UFE [Union Française de l'Electricité] compromise.'*"
145. The second extract concerns the management board meeting on 18 January 2005 (paragraph 59 of the statement of objections): "*The management board meeting on 18 January 2005 discussed the representation of the Suez group within the UFE. The intention was that the Suez group would be represented by CNR, SHEM and Suez.*"

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<sup>69</sup> Electrabel annual report for 2004, p. 63: "*The company also has installed capacity of 3 710 MW from Compagnie Nationale du Rhône (CNR) whose output mainly comes from run-of-river power stations (19 stations); and 773 MW from Société Hydroélectrique du Midi (SHEM), mainly composed of peak capacity (49 power stations). In 2004, Electrabel raised its stake in CNR to 49.95%, for which it provides operational management. Its control of SHEM capacities will be further consolidated with the agreement reached in November 2002 with SNCF: Electrabel acquired a 40% stake in SHEM early in 2005 and will increase its share to 80% in 2007.*" Moreover, the table on p. 93 of the annual report for 2004, entitled "*profile of power stations - situation on 31.12.2004*", which highlights Electrabel's production capacities, makes explicit reference to CNR's 19 production installations.

146. Lastly, the third extract concerns the supervisory board meeting on 8 December 2006 (paragraph 62 of the statement of objections), during which "*one of the CNR directors, Mr [...]\*, spoke of the participation of CNR in the insurance programmes of the Suez group and in the mutualised tranche of the civil liability programmes*".
147. Second, the extracts dating from 2005-2006 show that CNR was considered as belonging *de facto* to the Suez group before June 2007, the date on which Electrabel maintains that it acquired *de facto* control of CNR.
148. Third, the fact that CNR did not, at the end of 2006, benefit from certain arrangements reserved for the Suez group is irrelevant. The very fact that the managers of CNR and Electrabel considered CNR to be eligible for these arrangements is an indication that CNR was *de facto* deemed to belong to Suez.
149. Fourth, Electrabel mentions only two extracts which it says the Commission failed to take into account in the statement of objections.
150. On the one hand, Electrabel mentions the supervisory board meeting on 7 July 2005, which it has already referred to, during which it was stated that the majority of CNR's share capital would remain in public ownership because of the Murcef Law. According to Electrabel, this statement shows that CNR was not considered as belonging to the Suez group.
151. In fact, it is possible to conclude from that statement only that Electrabel, because of the Murcef Law, was not in a position to acquire *de jure* control over CNR. However, it is not possible to infer that Suez (via Electrabel) was not in a position to exercise *de facto* control over CNR. Accordingly, the statement does not contradict the extracts used by the Commission in the statement of objections.
152. Electrabel also mentions a statement that it maintains was made by the representative of the State at the supervisory board meeting on 5 July 2007, who "*wanted 2008, the year in which the Suez group was reorganised, also to be the year in which responsibilities are clarified within the configuration constituted by Suez/Electrabel on one side and CNR on the other, so that CNR's role in the future would be clearly defined*"<sup>70</sup>. According to Electrabel, this statement shows that it is only with effect from 2007 that it is possible to identify statements that actually reveal that CNR would soon belong to the Suez group.
153. It should be pointed out at the start that the minutes of the supervisory board meeting on 5 July 2007 do not contain such a statement<sup>71</sup>.
154. Supposing that such a statement was made, it would be irrelevant. Electrabel cannot argue that it reveals that CNR would soon belong to the Suez group since, elsewhere, Electrabel maintains that it had exercised *de facto* control over CNR since June 2007, before the date of the supervisory board meeting. Moreover, the statement is concerned only with a clarification of responsibilities, which does not

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<sup>70</sup> Paragraph 100 of the reply.

<sup>71</sup> Nor does such a statement figure in the minutes of the meeting of the supervisory board on 6 July 2007.

allow any conclusions to be drawn concerning the date on which Electrabel acquired *de facto* control over CNR.

155. Furthermore, in the reply to the letter setting out the facts of the case, Electrabel challenges the view that the Suez annual report for 2003 and the Electrabel annual report for 2004 strengthen the evidence that CNR was regarded *de facto* as belonging to the Suez group as early as 2004. Electrabel stresses that the reports (i) do not corroborate the evidence drawn from Electrabel's industrial role within CNR, and (ii) do not consider Electrabel's shareholding in CNR to be a controlling one.
156. Electrabel's argument is not well founded.
157. With regard to the industrial role played by Electrabel within CNR, Electrabel refers again to the argument that it has already developed concerning the importance of the industrial role played by EDF within CNR. As shown above in paragraphs 99 to 102, that argument is not well founded. And to the observation that the Suez and Electrabel reports include CNR's production capacity in that of Electrabel, Electrabel's only objection is that the observation "*is not of itself sufficient to demonstrate that their managers regarded CNR as an entity subject exclusively to de facto control.*" But the Commission has never claimed that the observation is by itself decisive.
158. With regard to Electrabel's argument that the reports in question do not present the shareholding in CNR as a controlling shareholding, such an argument is irrelevant, as the concept of control for purposes of the consolidation of accounts is outside the legal framework governing Community control of concentrations. In any event, a company should not be allowed to avoid the rules on merger control by invoking the decisions it has itself taken when drawing up its annual accounts.

**6) Electrabel has [...]\***

159. The Agreement provides [...]\*.
160. For instance, under the Agreement, [...]\*.
161. In its reply to the statement of objections, Electrabel relies on point [...]\* of the notice of 10 July 2007 to argue that the fact that [...]\* is not in itself enough to confer *de facto* sole control over CNR<sup>72</sup>.
162. First of all, on a formal level, the Commission would point out that the relevant notice is not the notice of 10 July 2007 but the notice of 2 March 1998, paragraph [...]\* of which reads: "[...]\*." But the rule is in any event substantially the same in the two notices.
163. As pointed out above, [...]\*, the Agreement allows Electrabel [...]\*. Electrabel is therefore assured of having sole control on a durable basis, [...]\*.

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<sup>72</sup> [...]\* of the notice of 10 July 2007 reads: "[...]\*".

164. Against this background, [this should be seen as an additional element which, together with other elements, may lead to the conclusion that there is sole control]\*.

## 7) Conclusion

165. For all the reasons set out in the present decision, it is clear that Electrabel has indeed exercised sole control over CNR since 23 December 2003.
166. In this regard, it should be noted that in the draft Form CO dated 17 January 2008 Electrabel arrived at the same conclusion. Electrabel first of all stated that it had acquired *de facto* control of CNR in 2004: "*in the light of the Commission's decision-making practice, de facto sole control appears to have existed since 2004, when Electrabel's share of the voting rights increased from 16.88% to 47.92%*"<sup>73</sup>. Electrabel confirmed this analysis, in more categorical terms, later in the same document, where, following a discussion about control, it concluded: "*under these circumstances, and in the light of the Commission's decision-making practice, the parties take the view today that Electrabel has held de facto sole control over CNR since 2004*"<sup>74</sup>. This draft Form CO was not subject to any legal reservations.
167. It should also be noted that the three allegedly new elements which arose between the end of 2006 and July 2007, and on which Electrabel relies to conclude that it acquired *de facto* control over CNR only in 2007, are not relevant: they are: (i) the decision of Electrabel's accounting department, at the end of 2006, to consolidate the shareholding in CNR by the global integration method and not by the equivalence method; (ii) a letter from the Commission Française de Régulation de l'Energie (CRE) dated 5 July 2007, in which the CRE considered that CNR and Electrabel were linked companies; and (iii) the general meeting of CNR's shareholders held on 8 June 2007, which confirmed that Electrabel had a *de facto* majority at the meeting.<sup>75</sup>
168. First, the change in the method by which CNR is consolidated into Electrabel's accounts is Electrabel's own decision and does not constitute a new fact outside Electrabel's control.
169. Second, the CRE's analysis is based merely on the finding that Electrabel has been consolidating its shareholding in CNR globally since the 2006 financial

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<sup>73</sup> Draft Form CO, 17 January 2008, p. 18.

<sup>74</sup> Draft Form CO, 17 January 2008, p. 27.

<sup>75</sup> See Electrabel's letter dated 9 August 2007, already referred to: "*The recent modifications that took place in the exploitation and industrial organisation of CNR have led Electrabel to consolidate this shareholding by the method of global integration for the establishment of accounts 2006, whereas it previously used the method of equivalence. The last general meeting of shareholders of CNR, which took place last 28 June, confirmed that so far, Electrabel has de facto been able to gather a majority of votes for its proposals. In addition, the Commission Française de Régulation de l'Energie took the view last July that Electrabel and CNR were companies linked within the meaning of the Law on the public energy and gas service*". See also Form CO, paragraphs 111 to 115.

year<sup>76</sup>. In addition, the CRE is a national authority without any powers in relation to Community competition law. Consequently, the CRE's decision does not constitute a new fact to be taken into account here.

170. Lastly, as explained in paragraphs 53 to 59, the general meeting of CNR's shareholders held on 8 June 2007 cannot be cited in order to show that the meeting determined the existence of control of CNR by Electrabel, or that control could be identified only *a posteriori*.
171. It may be pointed out that no significant changes in the governance of CNR occurred between 23 December 2003 and 9 August 2007 (the date in which Electrabel consulted the Commission). There were only marginal increases in Electrabel's shareholding in CNR, which grew by 0.03% (from 49.95% to 49.98% of the capital), and its voting rights, which grew by 0.05% (from 47.92% to 47.97%), and the same corporate bodies (management board and supervisory board) remained in place. In addition, the relevant provisions of the Murcef Law have remained in force without any amendment from 2001 to the present day.
172. Electrabel thus failed to comply with its obligations under Regulation (EEC) No 4064/89. The information set out above shows, at the very least, that Electrabel acted negligently by putting into effect a concentration with a Community dimension, in the form of the acquisition of sole control over CNR, on 23 December 2003, and by referring this concentration to the Commission only in August 2007.
173. Therefore, Electrabel, which did not ask for exemption under Article 7(4) of Regulation (EEC) No 4064/89, has committed an infringement, which is not time-barred, of Article 7(1) of that Regulation, according to which a concentration is not to be implemented until it has been notified and declared compatible with the common market.

## **V. DECISION TO IMPOSE FINES**

174. For these reasons, the Commission concludes that Electrabel acquired sole control of CNR on 23 December 2003. Electrabel has put into effect a concentration with a Community dimension from 23 December 2003, in breach of Article 7(1) of Regulation (EEC) No 4064/89.
175. Under Article 14(2)(b) of Regulation (EEC) No 4064/89, the Commission may by decision impose on the undertakings concerned within the meaning of Article 5 fines not exceeding 10% of the aggregate turnover of the undertakings concerned where, either intentionally or negligently, they put into effect a concentration in breach of Article 7(1) of that Regulation.
176. Article 14(2)(b) of Regulation (EC) No 139/2004 likewise provides that the Commission may by decision impose on the undertakings concerned within the

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<sup>76</sup> Letter from the CRE dated 5 July 2007 to Electrabel France, regarding the compensation of the costs of TaRTAM – T1 2007: “with regard to the information in its possession, in particular note 35 to the consolidated accounts presented in Electrabel SA’s annual report for 2006, the CRE considers that Electrabel France has to be regarded as linked to CNR within the meaning of Article 30-2 of the Law of 9 August 2004. According to this note, it is the situation of *de facto* control of Electrabel SA over CNR which has justified the consolidation of CNR by global integration into the accounts of Electrabel SA, which controls Electrabel France”.

meaning of Article 5 fines not exceeding 10% of the aggregate turnover of the undertaking concerned where, either intentionally or negligently, they implement a concentration in breach of Article 7 of that Regulation.

177. Regulation (EEC) No 4064/89 and Regulation (EC) No 139/2004 therefore provide for the same penalty for breach of Article 7 involving the implementation of a concentration before it has been declared compatible by the Commission. Against this background, Electrabel cannot claim that there is a subsequent and less severe provision that ought to be applied.
178. Moreover, under Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition<sup>77</sup>, the limitation period in proceedings is (i) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations, and (ii) five years in the case of all other infringements.
179. Under Article 1 of Regulation (EEC) No 2988/74, therefore, the limitation period for an infringement of Article 7(1) of Regulation (EEC) No 4064/89 is five years.
180. Furthermore, Article 2 of Regulation (EEC) No 2988/74 provides that any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period in proceedings. On the basis of Article 11(2) of Regulation (EC) No 139/2004, the Commission sent an initial request for information to Electrabel on 17 June 2008 for the purpose of the preliminary investigation of the said infringement, and then a statement of objections on 17 December 2008. The limitation period in respect of the infringement of Article 7(1) of Regulation (EEC) No 4064/89 was therefore interrupted by the request for information dated 17 June 2008, and by the statement of objections of 17 December 2008.
181. In its reply to the statement of objections, Electrabel submits that the statement of objections does not explain why out of two alternative limitation periods the period applicable to the alleged infringement should be the five years for “other infringements” rather than the three years for “infringements concerning notifications of undertakings”. Electrabel acknowledges that the Regulation does seem to distinguish between procedural and substantive infringements.
182. It must be observed that an infringement consisting of putting into effect a concentration in breach of Article 7(1) of Regulation (EEC) No 4064/89 is not merely an absence of notification, but conduct that produces a structural change in the conditions of competition. It must also be observed that as regards penalties Regulation (EEC) No 4064/89 makes a distinction between infringements of Article 4, on the obligation to notify, where the penalty ranges from €1 000 to €50 000, and infringements of Article 7, where the maximum fine is 10% of the aggregate turnover. This confirms that infringements of Article 7 are of a substantive nature (like the other infringements that incur a fine of up to 10% of

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<sup>77</sup> OJ L 319, 29.11.1974, p. 1.

turnover), rather than of a procedural nature. Thus Electrabel's objection is not well founded.

183. Consequently, the infringement committed by Electrabel is not time-barred.
184. Under Article 14(3) of Regulation (EEC) No 4064/89, the Commission must have regard to the nature and gravity of the infringement in setting the amount of a fine. The Commission also takes account of the duration of the infringement and of any aggravating or mitigating circumstances.
185. In addition, the imposition of fines for implementation of a concentration in the absence of notification is not unprecedented. The Commission has imposed fines on these grounds twice: in its Decision of 18 February 1998 in case IV/M.920 *Samsung/AST*<sup>78</sup>, and in its Decision of 10 February 1999 in case IV/M.969 *A.P. Møller*<sup>79</sup>.

#### 1) **Nature of the infringement**

186. The seventeenth recital to Regulation (EEC) No 4064/89 states: "*to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary*".
187. By making concentrations with a Community dimension conditional upon notification and prior authorisation, the Community legislature wanted to ensure that such concentrations were subject to effective control by the Commission, allowing the Commission where appropriate to prevent such concentrations from being carried out before it takes a final decision, thereby avoiding irreparable and permanent damage to competition.
188. The Commission therefore regards the infringement committed by Electrabel as a serious one, in that it undermines the effectiveness of Community provisions on the control of concentrations.
189. In its decision in the *A.P. Møller* case, the Commission stressed that: "*The Commission has a duty to uphold the basic principle that undertakings should be deterred from carrying out concentrations falling within the scope of the Merger Regulation without making appropriate notifications, and it should therefore use the powers granted to it by the Council for that purpose*"<sup>80</sup>.
190. In this context, an undertaking implementing a concentration with a Community dimension without obtaining prior authorisation unilaterally eludes the

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<sup>78</sup> OJ L 225, 26.8.1999, p. 12.

<sup>79</sup> OJ L 183, 17.7.1999, p. 29.

<sup>80</sup> Commission Decision of 10 February 1999 in case IV/M.969 *A.P. Møller*, paragraph 22.

requirement of *ex ante* control by the Commission laid down by the Community legislature<sup>81</sup>, and thus weakens the Community legal order.

191. In conclusion, any infringement of Article 7(1) of Regulation (EEC) No 4064/89 is by nature a serious infringement.

**2) Gravity of the infringement**

192. In its reply to the statement of objections Electrabel considers that the seriousness of an infringement has to be assessed in the light of the effects of the transaction on competition<sup>82</sup>. Therefore, according to Electrabel, an infringement of Article 7(1) of Regulation (EEC) No 4064/89 cannot be considered serious if the transaction carried out without authorisation does not cause permanent damage to competition.
193. It must be borne in mind that by its nature the infringement at issue breaches the most basic principle of the Community system of merger control, which is *ex ante* control. Unlike Articles 81 and 82 of the EC Treaty themselves, the Community legislature has expressly conferred on the Commission the sole power to assess concentrations with a Community dimension. To protect this basic principle the legislature has laid down heavy penalties (up to 10% of the turnover of the undertakings concerned) in case of infringement.
194. The Commission takes the view that the presence of damage to competition would indeed render the infringement more serious, and that the absence of any such damage in the present case is an important factor to be taken into account in determining the amount of the fine. However, the fact that the transaction does not raise competition concerns does not take away from the seriousness of the infringement<sup>83</sup>.
195. In addition, the Commission considers that Electrabel has acted negligently in the case at hand for the following reasons:

*a) Electrabel is a large company*

196. First, Electrabel is a large company with substantial legal resources at its disposal.
197. It is also a company that, like its parent company Suez (head of the Suez group), has been faced with obligations under Community law on many occasions, in particular with regard to the control of concentrations between enterprises since such control has existed. A number of Commission decisions in the field of control of concentrations have been taken concerning Electrabel, whether as a direct<sup>84</sup> or indirect<sup>85</sup> notifying party. It is therefore a company that is familiar with

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<sup>81</sup> See the judgments of the Court of Justice in Case C-170/02 *Schlüsselverlag J. S. Moser and Others v Commission* [2003] ECR I-9889, paragraph 32, and Case C-42/01 *Portugal v Commission* [2004] ECR I-6079, paragraph 50.

<sup>82</sup> Reply to the statement of objections, paragraphs 159 and 160.

<sup>83</sup> See in particular the Commission Decision in case COMP/M.2624 *BP/Erdölchemie*, paragraph 51.

<sup>84</sup> See cases COMP/M.3003 *Electrabel/Energia Italiana/Interpower*, COMP/M.2712 *Electrabel/TotalFinaElf/Photovoltech*, and COMP/M.1803 *Electrabel/EPON*.

Community merger legislation and has sufficient legal resources to consider the need to notify a concentration<sup>86</sup>.

*b) Acquisition of control was foreseeable*

198. As set out in particular in paragraphs 53–56, the provisions governing Community control of concentrations applicable in 2003 with regard to the acquisition of a minority shareholding conferring *de facto* control were clear and unconditional, both from a reading of paragraph 14 of the notice of 2 March 1998 and from the Commission's decision-making practice.
199. In the case in question, in view of the above, and in particular the acquisition as early as December 2003 of such a large proportion of the share capital and voting rights compared with the remaining shares, other than those held by CDC, which were widely dispersed, Electrabel ought clearly either (i) to have been aware of the fact that it had sole control over CNR or (ii) at the very least to have considered this possibility, which should have prompted it to consult the Commission, as is custom (a custom with which a company the size of Electrabel is familiar)<sup>87</sup>.
200. CNR is also a large undertaking, being the second producer of electricity in France, with a turnover of €401 million in 2002 and €553 million in 2003, and the acquisition of EDF's holding in CNR was the consequence of commitments given by EDF to the European Commission in case M.1853 *EDF/EnBW*.

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<sup>85</sup> See, for example, case M.4180 *GDF/Suez*, notified to the Commission on 10 May 2006. In particular, see case IV/M.343 *Société Générale de Belgique/Générale de Banque* (in which the Suez group was the notifying party), where it was established that an increase in the capital participation from 20.94% to 25.96% was such as to lead to a change of ownership of control, it being understood that (i) this case is cited in paragraph 59, on *de facto* sole control, of the notice of 10 July 2007, and (ii) it had previously been cited in paragraph 14 of the notice of 2 March 1998, although the capital holding involved was of much smaller magnitude than in the present case. It may be pointed out that Suez was particularly well acquainted with case IV/M.343 *Société Générale de Belgique/Générale de Banque*, because Société Générale de Belgique was a subsidiary of Compagnie de Suez, as the Suez group was called at that time.

<sup>86</sup> See, in particular, Commission Decision of 10 February 1999 in case IV/M.969 *A.P. Møller*, paragraph 14: "In order to qualify A.P. Møller's behaviour, it is necessary to take into account that it is a very large European undertaking with significant activities in Europe and was previously, and is presently, involved in competition cases, both as a complainant and defendant, with the assistance of specialised advisors. A.P. Møller is a member of the Shipping Association which has an office in Brussels and offers advice to its members. Also, A.P. Møller has its own legal department at its head office in Copenhagen. Therefore, A.P. Møller must be expected to be aware - and even have a good knowledge - of Community legislation, including merger control, and it clearly possesses the means to obtain legal advice in order to consider, or at least question, whether its company structure would make some of its operations qualify as a notifiable concentration. Furthermore, the Merger Regulation and the Commission's notice are clear on the interpretation to be given to the notion of a group. It seems therefore reasonable to expect that A.P. Møller should have shown a larger degree of awareness of the legal requirements and regard for them."

<sup>87</sup> See, in particular, paragraph 6 of the Directorate-General for Competition's notice on best practices on the conduct of EC merger proceedings, <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>.

201. Against this background, if Electrabel, as it maintains, had taken full account of the Commission's established decision-making practice in this field<sup>88</sup>, it should have referred the matter to the Commission as early as December 2003, if necessary as part of a consultation process, as it did in 2007.
202. Electrabel was even better placed to consult the Commission rapidly since it already knew as early as July 2003, as indicated above, that it was going to acquire the shares held by EDF. This is reflected not only in the Agreement signed on 24 July 2003 but also in the composition of the management board and of the supervisory board, both appointed on 8 July 2003, ahead of the actual implementation of the Agreement.
203. In the reply to the statement of objections, Electrabel states that the infringement alleged by the Commission is at most a straightforward error on Electrabel's part, the gravity of which should be assessed in the light of the complexity of the legal and factual analysis that is needed to demonstrate *de facto* sole control in the case<sup>89</sup>. At the hearing, Electrabel stated that at the time it had considered the need to notify the transaction, or at the very least consult the Commission, but that in the end it had decided not to do so.
204. For the reasons set out throughout this Decision, the Commission maintains that the acquisition of control was clear on 23 December 2003. However, even assuming that the establishment of control was "*extremely complex*" (and the Commission considers that it was not), the logical and usual course for a company faced with the application of Regulation (EEC) No 4064/89 (as indeed of Regulation (EC) No 139/2004) should have been at least to consult the Commission. Accordingly, the Commission takes the view that Electrabel has shown the negligence referred to in Article 14(2) of Regulation (EEC) No 4064/89 ("*where, either intentionally or negligently*").

*c) Existence of precedents*

205. By contrast with the situation in the period when Commission decisions were adopted in the *Samsung/AST* and *A.P Møller* cases, in the case at hand Regulation (EEC) No 4064/89 had already been in force for some time (more than thirteen years on 23 December 2003) and the Commission had already proceeded against other companies and imposed fines on them for breach of Article 7(1) of that Regulation. The Commission has also adopted a number of other decisions on the basis of Article 14 of the same Regulation, which is very clear in terms of its scope and the powers conferred on the Commission.
206. Electrabel cannot therefore rely on any lack of experience or of decision-making practice, in particular with regard to the implementation of Articles 7 and 14 of Regulation (EEC) No 4064/89.

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<sup>88</sup> As spelt out in paragraph 14 of the notice of 2 March 1998, and confirmed by paragraph 59 of the notice of 10 July 2007.

<sup>89</sup> Paragraphs 164-168 of the reply to the statement of objections.

### 3) Duration of the infringement

207. Electrabel acquired sole control of CNR on 23 December 2003. On 9 August 2007 Electrabel contacted the Commission and began to supply it with all the information needed (i) to assess whether there was a concentration with a Community dimension and (ii) to prepare the case for notification.
208. In its reply to the statement of objections, Electrabel submits that the duration of the infringement, assuming there was an infringement, should be significantly reduced, because it should be taken to have started in 2006, as most of the evidence for the acquisition of control set out in the statement of objections is subsequent to December 2003; in any event, control should be held to have been acquired no earlier than 29 June 2004, as this was the date of the first general meeting of shareholders after the acquisition of the CNR shares previously held by EDF.
209. With regard to the date on which the alleged infringement ended, Electrabel takes the view that it would be quite unjustifiable to take account of the time that elapsed between the date on which Electrabel first contacted the Commission (9 August 2007) and the date on which it formally notified the transaction (26 March 2008). Electrabel points out that it contacted the Commission on 9 August 2007 and on that date began providing the Commission with all the information it needed to carry out its assessment<sup>90</sup>.
210. With regard to the date on which the infringement began, the Commission considers that it must be the date on which Electrabel acquired EDF's holding, which gave it *de facto* control of the general meeting of shareholders, that is to say 23 December 2003. Electrabel already controlled CNR's management board since the general meeting of shareholders and the meeting of CNR's supervisory board in June 2003, ahead of the Agreement with CDC concluded in July 2003.
211. As regards the end of the infringement, the Commission would point out that once a concentration has been implemented, and for as long as it continues to be implemented, a breach of Article 7 can end only when the Commission authorises the concentration or grants exemption.
212. Electrabel did not ask for exemption under Article 7(4) of Regulation (EEC) No 4064/89 either before or after the consultation that began on 9 August 2007. Accordingly, the duration of the infringement from the unauthorised acquisition of sole control of CNR to the authorisation of the concentration by the Commission is four years, four months and seven days.
213. A long time elapsed between the date on which Electrabel acquired sole control of CNR (23 December 2003) and the date on which it informed the Commission (9 August 2007), and between the date on which it informed the Commission (9 August 2007) and the date on which it notified the transaction (26 March 2008).

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<sup>90</sup> Paragraph 180 of the reply to the statement of objections.

214. The time Electrabel took to notify the transaction is especially long considering that the transaction related essentially to the energy markets which had recently been studied carefully by the Suez group in connection with the merger between GDF and Suez (which was notified to the Commission on 10 May 2006, and was the subject of a Commission decision on 14 November 2006). For example, between Electrabel's letter of 9 August 2007 and the first draft Form CO, submitted to the Commission departments on 7 December 2007, almost four months had passed.
215. Nevertheless, although the concentration was actually notified only on 26 March 2008 and authorised by the Commission on 29 April 2008, the Commission, exercising its discretion and without prejudice to its general position of principle, will not take account of the period of pre-notification and examination of the concentration. The Commission therefore makes a finding of infringement only up to 9 August 2007.
216. The period which the Commission has to take into account in determining the fine in this case is consequently three years, seven months and 17 days, which is a very long time, because, as has already been pointed out, there was no significant change between December 2003 and August 2007 (i) in the shareholding and voting rights in CNR held by Electrabel, (ii) in the composition of the governing bodies in place (management board and supervisory board) or (iii) in any other aspect likely to call into question the holding by Electrabel of sole control over CNR.
217. In its decision in case IV/M.969 *A.P. Møller*, cited above, the Commission took the view that the risk of prejudice to the consumer increased with the duration of the infringement, and although the infringement committed there lasted for less than the infringement in the present case, the Commission considered that it had lasted for a significant time<sup>91</sup>.

#### 4) Mitigating circumstances

##### *a) Electrabel brought the matter to the Commission's attention on its own initiative*

218. The Commission notes that Electrabel contacted the Commission on its own initiative on 9 August 2007, which constitutes a mitigating circumstance. It should be pointed out, though, that this was more than three and a half years after it had acquired EDF's holding.

##### *b) Cooperation with the Commission*

219. Electrabel states that it then cooperated fully with the Commission throughout the notification procedure and thereafter, responding as quickly as possible and fully to the Commission's requests for information. In the statement of objections the Commission acknowledged that Electrabel had cooperated. But it must be observed that the period of pre-notification was long: Electrabel submitted a first draft Form CO only on 7 December 2007, almost four months after it had contacted the Commission.

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<sup>91</sup> Commission Decision of 10 February 1999 in case IV/M.969 *A.P. Møller*, paragraph 19.

*c) Non-concealment of the shareholding in CNR*

220. Electrabel stresses that during the period 2004-2007, it never sought to conceal the level of its shareholding in CNR and its involvement in CNR's activities, and takes the view that this constitutes a mitigating circumstance.
221. The fact that Electrabel did not conceal its shareholding or its involvement in CNR, in particular in connection with the notification in case COMP M.4180 *GDF/Suez*, does not constitute a mitigating circumstance.
222. The fact that the Commission did not investigate this aspect does not create a presumption of legality. Electrabel was in possession of all the information needed for an analysis of the situation with regard to control of CNR, and infringed its obligation to suspend the implementation of the transaction until such time as it had notified it and obtained the Commission's authorisation.
223. At best, the fact that the Commission did not investigate this aspect might tend to show that Electrabel believed in good faith that its shareholding in CNR did not confer control over CNR. However, the Commission notes that for infringement of Article 7(1) of Regulation (EEC) No 4064/89, Article 14 of that Regulation does not require intent; the Commission therefore considers that Electrabel's behaviour constituted negligence and was not necessarily intentional.

**5) Aggravating circumstances**

224. There are no aggravating circumstances here.

**6) Conclusion**

225. Electrabel has committed a serious infringement. This infringement was committed by a large undertaking, with experience in merger control proceedings and with substantial legal resources. The analysis of the existence of control was not a complex one. The Commission has nevertheless taken full account of the absence of damage to competition. On the question of mitigating circumstances, the Commission notes that Electrabel disclosed the situation voluntarily and has answered the Commission's questions.

**VI. AMOUNT OF THE FINES**

226. When imposing penalties, the Commission takes into account the need to ensure that fines have a sufficiently deterrent effect. In the case of an undertaking of the size of Electrabel, the amount of the penalty must be significant in order to have a deterrent effect.
227. In order to impose a penalty for the infringement and prevent it from recurring, therefore, and given the specific circumstances of the case at hand, the Commission considers it appropriate to impose a fine of €20 000 000 under Article 14(2)(b) of Regulation (EEC) No 4064/89,

HAS ADOPTED THIS DECISION:

*Article 1*

By putting into effect a concentration with a Community dimension in the period 23 December 2003 to 9 August 2007, before it was notified and before it was declared compatible with the common market, Electrabel SA has infringed Article 7(1) of Regulation (EEC) No 4064/89.

*Article 2*

A fine of €20 000 000 is hereby imposed on Electrabel for the infringement referred to in Article 1.

*Article 3*

The fine imposed in Article 2 shall be paid in euro within three months of the date of notification of this Decision into the following Commission bank account with the following bank:.

[...]\*

After the expiry of that period, interest shall automatically be payable on the fine at the rate charged by the European Central Bank on its principal refinancing operations on the first working day of the month in which this Decision is adopted, plus 3.5 percentage points.

*Article 3*

This Decision is addressed to:

Electrabel SA  
Boulevard du Régent/Regentlaan 8  
B-1000 Brussels

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 10 June 2009

For the Commission

*(signed)*  
Neelie Kroes  
Member of the Commission